82142-9

~~No. 82973-0~~

WASHINGTON SUPREME COURT

LINDA CUNNINGHAM AND DOWNEY C. CUNNINGHAM, A MARITAL COMMUNITY

Appellants

vs.

RONALD F. NICOL, M.D.; VALLEY RADIOLOGISTS, INC., P.S. and MULTICARE HEALTH SYSTEM, INC. dba COVINGTON MULTICARE CLINIC

Respondents.

On appeal from King County Superior Court
No. 08-2-28582-1
Honorable Cheryl Carey

OPENING BRIEF OF APPELLANTS CUNNINGHAM

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A. INTRODUCTION

In 2008 Linda Cunningham discovered that she received negligent health care in 2000. Her legal rights to pursue an injury claim would last for only one year under the one year discovery rule; however, her claim would be barred by the eight year statute of repose if she did not commence her suit within eight years of the date of the negligent act. Seven years and nine months after the negligent act, having survived invasive cranial surgeries, and armed with a certificate of merit based on careful and diligent review of all clinical records and evidence, Linda attempted to commence her legal claim within the eight year period embodied in the statute of repose. The trial court decided Linda was too late, because she could not to comply with the statutory requirement for commencement of the legal claim.

The appellants now challenge the constitutionality of RCW 7.70.100(1), (Appendix A) or the statue of repose under RCW 4.16.350 (Appendix B), (hereinafter jointly referenced under the "notice" terminology and arguments pertaining to RCW 7.70.100(1)) and the mandatory 90 day notice of "intention to commence" requirement which makes no provision for extending the applicable statute of repose.

RCW 7.70.100(1) imposes the notice only on plaintiffs like Linda, as a mandatory predicate to commencing a legal action arising in a medical negligence context. The notice requirement conflicts with the statute of repose under RCW

4.16.350, and the notice requirement effectively reduces the statute of repose to seven years and nine months.

Although RCW 7.70.100(1) permits extension of *any* applicable statute of limitation to preserve rights and allow for compliance with the notice requirement, the statute does not extend the statute of repose. What is the objective of legislation in this context that fails to provide an extension of the statute of repose, to allow the mandatory "notice of intention to commence"?

The mandatory 90 day "notice of intention to commence" places unreasonable, arbitrary and unconstitutional barriers on access to the courts; the notice requirement violates equal protection and privileges and immunities guarantees by treating like persons unequally, without justification, and by employing a means that is not the least restrictive; the mandatory notice denies due process, both procedural and substantive; and the notice requirement invades the province of the judiciary, in violation of separation of powers principles.

The legislative context for the statute at issue is also before this Court in *Putman v. Wenatchee Valley Med. Ctr., P.S.*, No. 80888-1 and *Waples v. Yi*, 146 Wn. App. 54, 189 P.3d 813 (2008) *review granted* 165 Wn.2d.1031, 203 P.3d 382 (2009). The appellants are moving to accelerate this appeal and/or for consolidation with *Waples*.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing the appellant's medical negligence claim by ruling that the 90 day notice requirement in RCW 7.70.100 (1) or the statue of repose under RCW 4.16.350 does not create an unconstitutional barrier to the commencement of a legal claim, which is a violation of fundamental rights to open access to the courts. Wash. Const., art. I, § 10. CP 188-90.

2. The trial court erred in dismissing appellant's medical negligence claim by ruling that the 90 day notice requirement in RCW 7.70.100(1) does not offend federal and state equal protection and privileges and immunities guarantees. Wash. Const., art. I, § 12 and U.S. Const. amend. X1V, § 1. CP 188-90.

3. The trial court erred in dismissing appellant's medical negligence claim by ruling that the 90 day notice requirement in RCW 7.70.100(1) does not offend federal and state due process rights, both procedural and substantive. U.S. Const. amend. X1V, § 1; Wash. Const. art. I, § 3. CP 188-90.

4. The trial court erred by ruling that the 90 day notice requirement in RCW 7.70.100(1) does not violate constitutional principles pertaining to separation of powers. Wash. Const. art. IV, § 1. CP 188-90.

C. ISSUES PERTAINING TO ASSIGMENTS OF ERROR

The following issues pertain to the assignments of error above:

1. Does the 90 day notice requirement in RCW 7.70.100(1), or the statue of repose under RCW 4.16.350, violate constitutional guarantees of open access to courts under facts where the statute of repose is eight years, but a plaintiff acting within the statute of limitations and acting within the repose period, is not allowed to provide notice of intention to commence the action? Wash. Const. art. I, § 10.

2. Does the 90 day notice requirement in RCW 7.70.100(1), or the statue of repose under RCW 4.16.350, offend the federal and state equal protection and privileges and immunities principles? Wash. Const., art. I, § 12 ; U.S. Const. Amend. X1V, § 1.

3. Does the 90 day notice requirement in RCW 7.70.100(1), or the statue of repose under RCW 4.16.350, offend federal and state due process rights, both procedural and substantive? U.S. Const. amend. X1V, § 1; Wash. Const. art. I, § 3.

4. Does the 90 day notice requirement in RCW 7.70.100(1), or the statue of repose under RCW 4.16.350, violate separation of powers? Wash. Const. art. IV, § 1.

D. STATEMENT OF THE CASE

Appellant Linda Cunnigham is a 54-year-old woman, who in August 2000, was referred for imaging of her brain to rule out serious pathology. The radiology specialists, in their written opinions dated August 24, 2000, reported the study as normal when, in fact, the study showed tumors. The tumors grew over the next eight years to eventually require invasive surgeries. Linda Cunningham has survived the negligence of the radiology professionals and the delays in her diagnosis and treatment, and she now asserts a legal claim that should be constitutionally protected to survive the inattention of the 2006 Legislature, which created direct conflicts between RCW 7.70.100 and RCW 4.16.350. CP 1-9.

Appellants allege that on or about August 24, 2000, Linda Cunningham was seen by her primary care physician Pamela Yung MD, and referred for imaging studies through the Covington Multicare Clinic to rule out any serious and life threatening causes of Linda Cunningham's reported symptoms. Appellant Linda Cunningham requested, and was legally entitled to receive, reasonably prudent health care services. CP 1-9.

Appellants allege that the imaging studies at issue (brain MRI) were taken on August 24, 2000 and reported by and through the respondents as normal. In fact, the imaging studies were markedly abnormal, and showed abnormalities of extra-axial tumor mass, evident on all pulse sequences and more than eight images. Linda Cunningham did not learn of any issues pertaining to the 2000

films until February 2008, at which time she was informed by her treating physicians that she would require multiple surgeries and treatments to save her life. CP 1-9. At that time of her surgeries she had six months remaining under the eight year statute of repose.

The Cunninghams alleged that the health care services she received in 2000 were below the standard of care, and they alleged that the respondents negligently failed to accurately review and accurately report the abnormalities on the subject imaging studies, and failed to alert the appellants to the inaccurate reporting. CP 1-9.

On August 4, 2008 appellants served the Notice of Intent to Sue to Respondents Ronald Nicol, M.D. and Valley Radiologist, and on August 5, 2008 served Respondent Mutlicare Health System, Inc. d/b/a Covington Multicare Clinic (Appendix D).

On August 20, 2008 Appellants filed their Summons and Complaint CP1-9 (Appendix E), along with their Certificate of Merit. CP 10-17. The conflict between the statute of repose at RCW 4.16.350 and the mandatory notice of intention to commence requirement was referenced in the Complaint at page 4 paragraph 5. CP 1-9.

On September 19, 2008 Respondents Ronald Nicol, M.D., and Valley Radiologists, Inc. filed their Answer to Complaint. CP 33-37.

On January 29, 2009 Respondents Multicare Health System, Inc. d/b/a Covington Multicare Clinic filed their Answer and Affirmative Defenses. CP 66-68.

On January 29, 2009 Respondents Ronald Nicol, M.D., and Valley Radiologists, Inc. filed their Motion to Dismiss for Failure to Comply with RCW 7.70.100. CP 58-65.

On February 13, 2009 Respondents Multicare Health System, Inc d/b/a Covington Multicare Clinic filed their Joinder in Motion to Dismiss for Failure to Comply with RCW 7.70.100. CP 59-75.

Appellants opposed the dismissal of the case, and asked the trial court to delay ruling on dispositive motions until this Court issued its opinion in *Putman v. Wenatchee Valley Med. Ctr., P.S.*, No. 80888-1. CP 90-121.

On March 13, 2009 defendants jointly moved to dismiss the claims against them, under RCW 7.70.100(1), which was adopted as part of the "Comprehensive Patient Protection Act", then under review in *Putman* (and now also under review in *Waples v. Yi*, 146 Wn. App. 54, 189 P.3d 813 (2008) *review granted*). This 2006 legislation, upon which the motion to dismiss relied, re-enacted the statute of repose declared unconstitutional by this Court; and one provision of that legislation (RCW 7.70.100(1)) required Cunningham to provide a 90 day notice of intention to commence suit as a mandatory condition predicate to commencement of their legal claims in this matter.

As it applies to the present appeal, according to the House Bill Report 2SHB 2292 (Appendix C), the stated intention of the legislature was to re-enact the statute of repose in light of the *DeYoung* decision (see pages 4 and 7) and to "make the civil justice system more understandable, fair and efficient" (see section entitled Summary of Second Substitute Bill, at page 5). Although the statute extended the statute of limitation to accommodate the notice requirement and protect the rights of all parties, the statute failed to extend the statute of repose.

After briefing and oral argument that involved references to the pending *Putman* appeal, and statutory conflicts that could only be resolved by this Court, on March 13, 2009 the King County Superior Court issued its Summary Judgment ruling and entered its Order Granting Defendants Nicol and Valley Radiologist Motion to Dismiss.

This appeal timely followed. CP 191-97.

E. STANDARD OF REVIEW

It is well established that constitutional challenges are questions of law, subject to de novo review. *Amunrud v.Board of Appeals*, 158 Wn. 2d 208, 143 P.3d 571 (2006). Additionally, the motion to dismiss brought by respondents was essentially a summary judgment proceeding and is subject to de novo review. On appeal our courts engage in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party.

Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hearst,* at 501.

F. ARGUMENT

1. The Ninety Day "Notice Of Intention To Commence" Requirement Violates Fundamental Rights Of Access To Our Courts.

Washington State made a fundamental and unequivocal constitutional commitment to assuring that all disputes may be resolved in our courts: "justice in all cases shall be administered openly, and without unnecessary delay." Wash. Const. art. I, § 10.

This Court has confirmed that the open courts guarantee provides a "right to a remedy for a wrong suffered." *King v. King,* 162 Wn.2d 378, 388, 174 P.2d 659 (2007). Additional authorities have confirmed that full access to the courts is a fundamental right. *Bullock v. Roberts*, 84 Wn.2d 101, 104, 524 P.2d 385 (1974). More specifically, Washington Const., art. I section 10, referenced as the "open courts" provision, established foundational principles that preserve a citizen's entitlement to both access to courts and the right to a remedy. *Rufer v. Abbott Labs.*, 154 Wn. 2d 530, 114 P.2d 1182 (2005).

This Court acknowledged a right to a remedy and additional Washington, case law, more specifically *Sofie v. Fibreboard Corp.*, 112 Wn. 2d 636, 771 P.2d 711, 780 P.2d 260 (1989), supports the view that Article I section 10 limits legislative authority to extinguish or substantially impair a civil remedy of a type existing at common law when the Constitution was adopted.

As briefed and argued in *Putman*, appellants now request that this Court confirm that civil remedies for personal injuries arising from alleged negligent health care indeed qualify as remedies that existed at common law at the time the Constitution of Washington State was adopted. The Legislature cannot extinguish or substantially burden such remedies without replacing them with an adequate substitute remedy (quid pro quo), in the absence of an overwhelming public necessity, when no alternative method can be shown.

In the present case, the Legislature's failure to extend the statute of repose, to allow compliance with the 90 day notice of intention to commence the claim, in the presence of the legislative authority to extend the statute of limitation, leads to only one conclusion: in the present statutory context, given the conflict with the statute of repose, and the involvement of fundamental rights, the pre-filing notice of commencement under RCW 7.70.100(1) and/or the statue of repose is unconstitutional.

2. **The 90 Day "Notice Of Intention To Commence" Violates Constitutional Guarantees Under The Privileges And Immunities Clause Of The Washington Constitution And The Equal Protection Clause Of The Constitution Of The United States.**

RCW 7.70.100(1) only obstructs the rights of the plaintiff who alleges medical negligence, and attempts to provide the mandatory notice within the last ninety days before the expiration of their legal rights under the applicable statute of repose. This statute creates this sub-class of plaintiffs, and with regard to such a sub-class of plaintiffs, the legislature has terminated their rights without reason and without justification, in violation of Washington's privileges and immunities guarantees. Wash. Const. art. I, § 12. Additionally, this approach violates the federal equal protection guarantee under U.S. Const. amend. XIV, § 1.

Each of these constitutional provisions mandate that "persons similarly situated with respect to the legitimate purpose of the law" receive the same treatment. Under the present facts, the subject statute with its 90 day "notice of intention to commence" imposes a mandatory requirement only upon plaintiffs with legal claims arising from health care negligence. The fact that the Legislature extended the statute of limitation, but chose not to extend the statute of repose, means no notice of intention to commence can be provided after seven years and nine months, and this effectively limits the statute of repose period to seven years and nine months, contrary to law and RCW 4.16.350. This approach

diminishes the rights of all citizens, dangerously extending a legislative agenda that unintentionally encroaches on constitutional guarantees that protect us all.

Appellants respectfully inquire: Why did the Legislature extend the limitation period? Did it intend to preserve fundamental rights threatened by the notice requirement, and to facilitate compliance with the mandatory "notice of intention to commence" requirement? If so, why is there no comparable extension of the statute of repose under RCW 4.16.350? Is the resulting conflict fatal to the present statutory scheme, when both constitutional provisions require that "persons similarly situated with respect to the legitimate purpose of the law" receive equal treatment? *State v. Coria*, 120 Wn. 2d 156, 169, 839 P.2d 890 (1992).

For purposes of constitutional review, our courts analyze equal protection challenges under one of three standards of review: strict scrutiny, intermediate scrutiny, or rational basis. The appropriate level of scrutiny depends on whether a fundamental right is at issue. If a fundamental right is not involved, the court would typically inquire whether the legislation at issue bears a rational relationship to a legitimate governmental purpose. *Kustura v. Dept. of Labor and Indus.*, 142 Wash. App. 655, 175 P.3d 1131 (2008). In the present case, the "notice of intention to commence" requirement of RCW 7.70.100(1) fails under all standards, even the lowest threshold rational basis test.

The rational basis test defers to the Legislature's discretion to determine what measures are necessary to secure and protect public interests. *State v. Manussier*, 129 Wash. 2d at 673 (1996) (quoting *State v. Ward*, 123 Wash. 2d 488, 516, 869 P.2d 1062 (1994)).

Surely there is more at issue in this Court than a tactical advantage over a patient like Linda Cunningham. The U.S. Supreme Court noted that "the equal protection clause requires more than the mere incantation of a proper state purpose." *Trimble V. Gordon*, 430 U.S. 762, 769, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977). The courts must insist on knowing the relationship between the classifications adopted and the objectives to be attained. *Romer v. Evans*, 517 U.S. 620, 632, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).

In this case, what is the objective of legislation that fails to provide an extension of the statute of repose, to allow the mandatory "notice of intention to commence"?

In order to achieve an appropriate review of the factual basis for legislation and in the interest of serving the public good, our courts have not hesitated to strike down legislation that had permissible objectives, including the prevention of frivolous litigation, but lacked sufficient factual foundation for the courts to determine a specific relationship between the classification and the purposes served. *Romer v. Evans*, 517 U.S. 620, at 632-33 (1996).

In the present case, there is no rational basis pertaining to the failure to extend the statute of repose, in light of the explicit extension of the statute of limitation embodied in RCW 7.70.100. There is no rational basis for the "notice of intention to commence" to conflict with the statute of repose that slams the door on certain citizens. There is certainly no justification to suggest that such an obstacle under the facts of the present matter, would facilitate early, pre-commencement negotiations, mediation or resolution. Rather, the present statute explicitly creates a barrier and obstruction to fundamental rights.

3. The 90 Day "Notice Of Intention To Commence" Requirement Mandated By RCW 7.70.100(1), Violates The Due Process Guarantees Of The Washington And U.S. Constitutions.

Both constitutions guarantee due process and confer essential protections. Const. art. I, § 3; U.S. Const. amend. XIV, § 1. *In Re A Personal Restraint Of Dyer*, 143 Wn. 2d 384, 394, 20 P. 3d 907 (2001).

While due process principles address fair procedures, they also embrace "a substantive component that bars certain arbitrary, wrongful government actions." *Zinermon v.Burch,* 494 U.S. 113, 125, 110 S.Ct. 975, 108 L. Ed. 2d 100 (1990).

The mandatory notice requirement embodied in RCW 7.70.100(1), is arbitrary and ill conceived, and it violates substantive due process concerns, which are evaluated under the same criteria used for equal protection. See, *Amunrud v. Bd. of Appeals*, 158 Wn. 2d 208, 220-22, 143 P.2d 571 (2006). Due process principles, at their core, involve the "right to be meaningfully heard." *In*

re detention of Stout, 159 Wn. 2d 357, 370, 150 P.2d 86 (2007). The applicable test is one that focuses on essential balances among the following: (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures. *Id*, at 370, citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L Ed. 2d 18 (1976).

Any examination of these respective interests confirms the inescapable conclusion that the statutory extension of the statute of limitation, to allow for compliance with the mandatory pre-commencement notice, is consistent with all fundamental rights. Accordingly, the failure of the Legislature to provide for an extension of the statute of repose, in the face of the mandatory pre-commencement notice, renders the subject statutes unconstitutional, as they present the citizen litigant with an impossible barrier, in spite of the efforts by appellants to respect and comply with the applicable laws.

4. The Ninety Day "Notice Of Intention To Commence" Requirement Usurps The Exclusive Authority Of The Judiciary To Promote Rules Of Civil Procedure.

The Washington Constitution confirms that all judicial power is vested in the Supreme Court and other state courts. Wash. Const. art. IV, § 1. One aspect of that authority, exclusively within the province of the judicial branch, is the authority to establish its own rules of procedure and rules of evidence.

The power of the judiciary is confirmed in the Constitution and legal precedents. Washington state constitutional authority confirms the power to "establish *uniform* rules for the governance of the superior courts." (Emphasis added) Wash. Const. art. IV, § 24. This power should be protected and exercised to protect rights in addition to establishing access and process.

Such powers are "within the power of this Court to dictate, under the constitutional separation of powers, its own court rules, even if they contradict rules established by the Legislature." *Marine Power and Equipment Co. v. Industrial Indemnity Co.*, 102 Wn.2d 457, 461, 687 P.2d 202 (1984).

This Court has confirmed and clarified that "a legislative enactment may not impair this courts functioning or encroach upon the power of the judiciary to administer its own affairs. Ultimate power to regulate court related functions. belongs exclusively to this court." *Washington State Bar Association v. State*, 125 Wn. 2d 901, 908-09, 890 P.2d 1047 (1995). This Court must flex its constitutional authority to protect and preserve the very foundation of the democracy that serves us all.

In this regard, the statutory context challenged in this appeal is an encroachment and is unconstitutional.

G. CONCLUSION

We should all acknowledge that we are partners in a broad community of rights and responsibilities. Within our adversarial process, however, we anticipate that opposing parties will not argue for protection of fundamental and equal rights and due process for all citizens, and an opportunity for the case to be resolved on the merits. We anticipate lawyerly advocacy will seek to gain advantage from irrational legislation that defies explanation, and the issues raised by the Cunningham appellants are before this Court in several contexts, including *Putman*, *Waples*, and other cases where review has been deferred pending opinions in these other matters. The present facts in this appeal demonstrate a clear violation of citizen rights, which can only be corrected by this Court through a reasoned analysis and principled opinion to guide us all as we move forward together.

Appellants respectfully request that the trial court decision be overturned on the grounds that the statutory context challenged in this appeal is unconstitutional; and we further request that this matter be remanded for trial on the merits, with confirmation by this Court that this action was commenced in a timely manner.

Dated this 31st day of July, 2009.

THE PEARSON LAW FIRM, P.S.

By: _____
JERALD D. PEARSON, WSBA #8970
Attorney for Appellants

APPENDIX

APPENDIX A	RCW 7.70.100(1)
APPENDIX B	RCWA 4.16.350
APPENDIX C	House Bill 2292
APPENDIX D	Notices of Intent to Sue
APPENDIX E	Complaint for Personal Injuries in Tort (Medical Negligence)

Appendix A

C
West's Revised Code of Washington Annotated Currentness
Title 7. Special Proceedings and Actions (Refs & Annos)
Chapter 7.70. Actions for Injuries Resulting from Health Care (Refs & Annos)
→ 7.70.100. Mandatory mediation of health care claims--Procedures

(1) No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action. The notice required by this section shall be given by regular mail, registered mail, or certified mail with return receipt requested, by depositing the notice, with postage prepaid, in the post office addressed to the defendant. If the defendant is a health care provider entity defined in RCW 7.70.020(3) or, at the time of the alleged professional negligence, was acting as an actual agent or employee of such a health care provider entity, the notice may be addressed to the chief executive officer, administrator, office of risk management, if any, or registered agent for service of process, if any, of such health care provider entity. Notice for a claim against a local government entity shall be filed with the agent as identified in RCW 4.96.020(2). Proof of notice by mail may be made in the same manner as that prescribed by court rule or statute for proof of service by mail. If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the date the notice was mailed, and after the ninety-day extension expires, the claimant shall have an additional five court days to commence the action.

(2) The provisions of subsection (1) of this section are not applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name.

(3) After the filing of the ninety-day presuit notice, and before a superior court trial, all causes of action, whether based in tort, contract, or otherwise, for damages arising from injury occurring as a result of health care provided after July 1, 1993, shall be subject to mandatory mediation prior to trial except as provided in subsection (6) of this section.

(4) The supreme court shall by rule adopt procedures to implement mandatory mediation of actions under this chapter. The implementation contemplates the adoption of rules by the supreme court which will require mandatory mediation without exception unless subsection (6) of this section applies. The rules on mandatory mediation shall address, at a minimum:

(a) Procedures for the appointment of, and qualifications of, mediators. A mediator shall have experience or expertise related to actions arising from injury occurring as a result of health care, and be a member of the state bar association who has been admitted to the bar for a minimum of five years or who is a retired judge. The parties may stipulate to a nonlawyer mediator. The court may prescribe additional qualifications of mediators;

(b) Appropriate limits on the amount or manner of compensation of mediators;

(c) The number of days following the filing of a claim under this chapter within which a mediator must be selected;

(d) The method by which a mediator is selected. The rule shall provide for designation of a mediator by the superior court if the parties are unable to agree upon a mediator;

(e) The number of days following the selection of a mediator within which a mediation conference must be held;

(f) A means by which mediation of an action under this chapter may be waived by a mediator who has determined that the claim is not appropriate for mediation; and

(g) Any other matters deemed necessary by the court.

(5) Mediators shall not impose discovery schedules upon the parties.

(6) The mandatory mediation requirement of subsection (4) of this section does not apply to an action subject to mandatory arbitration under chapter 7.06 RCW or to an action in which the parties have agreed, subsequent to the arisal of the claim, to submit the claim to arbitration under chapter 7.04A or 7.70A RCW.

(7) The implementation also contemplates the adoption of a rule by the supreme court for procedures for the parties to certify to the court the manner of mediation used by the parties to comply with this section.

CREDIT(S)

[2007 c 119 § 1, eff. July 22, 2007; 2006 c 8 § 314, eff. June 7, 2006; 1993 c 492 § 419.]

HISTORICAL AND STATUTORY NOTES

Findings--Intent--Part headings and subheadings not law--Severability--2006 c 8: See notes following RCW 5.64.010.

Medical malpractice review--1993 c 492: "(1) The administrator for the courts shall coordinate a collaborative effort to develop a voluntary system for review of medical malpractice claims by health services experts prior to the filing of a cause of action under chapter 7.70 RCW.

(2) The system shall have at least the following components:

(a) Review would be initiated, by agreement of the injured claimant and the health care provider, at the point at which a medical malpractice claim is submitted to a malpractice insurer or a self-insured health care provider.

(b) By agreement of the parties, an expert would be chosen from a pool of health services experts who have agreed to review claims on a voluntary basis.

(c) The mutually agreed upon expert would conduct an impartial review of the claim and provide his or her opinion to the parties.

(d) A pool of available experts would be established and maintained for each category of health care practitioner by the corresponding practitioner association, such as the Washington state medical association and the Washington state nurses association.

(3) The administrator for the courts shall seek to involve at least the following organizations in a collaborative effort to develop the informal review system described in subsection (2) of this section:

(a) The Washington defense trial lawyers association;

(b) The Washington state trial lawyers association;

(c) The Washington state medical association;

(d) The Washington state nurses association and other employee organizations representing nurses;

(e) The Washington state hospital association;

(f) The Washington state physicians insurance exchange and association;

(g) The Washington casualty company;

(h) The doctor's agency;

(i) Group health cooperative of Puget Sound;

(j) The University of Washington;

(k) Washington osteopathic medical association;

(l) Washington state chiropractic association;

(m) Washington association of naturopathic physicians; and

(n) The department of health.

(4) On or before January 1, 1994, the administrator for the courts shall provide a report on the status of the development of the system described in this section to the governor and the appropriate committees of the senate and the house of representatives." [1993 c 492 § 418.]

Findings--Intent--1993 c 492: See notes following RCW 43.72.005.

Short title--Severability--Savings--Captions not law--Reservation of legislative power--Effective dates--1993 c 492: See RCW 43.72.910 through 43.72.915.

Laws 2006, ch. 8, § 314 rewrote the section, which formerly read:

"(1) All causes of action, whether based in tort, contract, or otherwise, for damages arising from injury occurring as a result of health care provided after July 1, 1993, shall be subject to mandatory mediation prior to trial.

"(2) The supreme court shall by rule adopt procedures to implement mandatory mediation of actions under this chapter. The rules shall address, at a minimum:

"(a) Procedures for the appointment of, and qualifications of, mediators. A mediator shall have experience or expertise related to actions arising from injury occurring as a result of health care, and be a member of the state bar association who has been admitted to the bar for a minimum of five years or who is a retired judge. The parties may

stipulate to a nonlawyer mediator. The court may prescribe additional qualifications of mediators;

"(b) Appropriate limits on the amount or manner of compensation of mediators;

"(c) The number of days following the filing of a claim under this chapter within which a mediator must be selected;

"(d) The method by which a mediator is selected. The rule shall provide for designation of a mediator by the superior court if the parties are unable to agree upon a mediator;

"(e) The number of days following the selection of a mediator within which a mediation conference must be held;

"(f) A means by which mediation of an action under this chapter may be waived by a mediator who has determined that the claim is not appropriate for mediation; and

"(g) Any other matters deemed necessary by the court.

"(3) Mediators shall not impose discovery schedules upon the parties."

2007 Legislation

Laws 2007, ch. 119, § 1 rewrote subsec. (1), which formerly read:

"(1) No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action. If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the service of the notice."

CROSS REFERENCES

Health carriers, standards and quality of care, rejected complaints submitted to nonbinding mediation, see § 48.43.055.

ADMINISTRATIVE CODE REFERENCES

Environmental claims, see WAC 284-30-900 et seq.

LAW REVIEW AND JOURNAL COMMENTARIES

A tale of two initiatives: Where propaganda meets fact in the debate over America's health care. Randolph I. Gordon and Brook Assefa, 4 Seattle J.Soc.Jus. 693 (2006).

LIBRARY REFERENCES

2007 Main Volume

Alternative Dispute Resolution ⚿ 444.
Westlaw Topic No. 25T.

Appendix B

Statute of Repose for Health Care Claims

West's RCWA 4.16.350

West's Revised Code of Washington Annotated Currentness
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.16. Limitation of Actions (Refs & Annos)
4.16.350. Action for injuries resulting from health care or related services--Physicians, dentists, nurses, etc.--Hospitals, clinics, nursing homes, etc.

Any civil action for damages for injury occurring as a result of health care which is provided after June 25, 1976 against:

(1) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric physician and surgeon, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his estate or personal representative;

(2) An employee or agent of a person described in subsection (1) of this section, acting in the course and scope of his employment, including, in the event such employee or agent is deceased, his estate or personal representative; or

(3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in subsection (1) of this section, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his employment, including, in the event such officer, director, employee, or agent is deceased, his estate or personal representative;

based upon alleged professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later, except that in no event shall an action be commenced more than eight years after said act or omission: PROVIDED, That the time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, until the date the patient or the patient's representative has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or the patient's representative has one year from the date of the actual knowledge in which to commence a civil action for damages.

For purposes of this section, notwithstanding RCW 4.16.190, the knowledge of a

custodial parent or guardian shall be imputed to a person under the age of eighteen years, and such imputed knowledge shall operate to bar the claim of such minor to the same extent that the claim of an adult would be barred under this section. Any action not commenced in accordance with this section shall be barred.

For purposes of this section, with respect to care provided after June 25, 1976, and before August 1, 1986, the knowledge of a custodial parent or guardian shall be imputed as of April 29, 1987, to persons under the age of eighteen years.

This section does not apply to a civil action based on intentional conduct brought against those individuals or entities specified in this section by a person for recovery of damages for injury occurring as a result of childhood sexual abuse as defined in RCW 4.16.340(5).

CREDIT(S)

[2006 c 8 § 302, eff. June 7, 2006. Prior: 1998 c 147 § 1; 1988 c 144 § 2; 1987 c 212 § 1401; 1986 c 305 § 502; 1975-'76 2nd ex.s. c 56 § 1; 1971 c 80 § 1.]

HISTORICAL AND STATUTORY NOTES

Purpose--Findings--Intent--2006 c 8 §§ 301 and 302: "The purpose of this section and section 302, chapter 8, Laws of 2006 is to respond to the court's decision in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136 (1998), by expressly stating the legislature's rationale for the eight-year statute of repose in RCW 4.16.350.

The legislature recognizes that the eight-year statute of repose alone may not solve the crisis in the medical insurance industry. However, to the extent that the eight-year statute of repose has an effect on medical malpractice insurance, that effect will tend to reduce rather than increase the cost of malpractice insurance.

Whether or not the statute of repose has the actual effect of reducing insurance costs, the legislature finds it will provide protection against claims, however few, that are stale, based on untrustworthy evidence, or that place undue burdens on defendants.

In accordance with the court's opinion in *DeYoung*, the legislature further finds that compelling even one defendant to answer a stale claim is a substantial wrong, and setting an outer limit to the operation of the discovery rule is an appropriate aim.

The legislature further finds that an eight-year statute of repose is a reasonable time period in light of the need to balance the interests of injured plaintiffs and the health care industry.

The legislature intends to reenact RCW 4.16.350 with respect to the eight-year statute of repose and specifically set forth for the court the legislature's legitimate rationale for adopting the eight-year statute of repose. The legislature further intends that the eight-year statute of repose reenacted by section 302, chapter 8, Laws of 2006 be applied to actions commenced on or after June 7, 2006." [2006 c 8 § 301.]

Findings--Intent--Part headings and subheadings not law--Severability--2006 c 8: See notes following RCW 5.64.010.

Application--1998 c 147: "This act applies to any cause of action filed on or after June 11, 1998." [1998 c 147 § 2.]

Application--1988 c 144: See note following RCW 4.16.340.
Preamble--Report to legislature--Applicability--Severability--1986 c 305: See notes following RCW 4.16.160.
Severability--1975-'76 2nd ex.s. c 56: "If any provision of this 1976 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1975-'76 2nd ex.s. c 56 § 15.]
Laws 1975-76, 2nd Ex.Sess., ch. 56, § 1, rewrote this section, which had read:

"Any civil action for damages against a hospital which is licensed by the state of Washington or against the personnel of any hospital, or against a member of the healing arts including, but not limited to, a physician licensed under chapter 18.71 RCW or chapter 18.57 RCW, chiropractor licensed under RCW 18.25, a dentist licensed under chapter 18.32 RCW, or a nurse licensed under chapter 18.88 or 18.78 RCW, based upon alleged professional negligence shall be commenced within (1) three years from the date of the alleged wrongful act, or (2) one year from the time that plaintiff discovers the injury or condition was caused by the wrongful act, whichever period of time expires last."

Laws 1986, ch. 305, § 502, rewrote the proviso at the end of the first paragraph, and added the second paragraph. Prior to revision, the proviso read: *"Provided,* That the limitations in this section shall not apply to persons under a legal disability as defined in RCW 4.16.190."

Laws 1987, ch. 212, § 1401, in the second paragraph, inserted "and such imputed knowledge shall operate to bar the claim of such minor to the same extent that the claim of an adult would be barred under this section," and added the third paragraph, relating to the effective date for imputing the knowledge of a custodial parent or guardian.

Laws 1988, ch. 144, § 2, added the last paragraph.

Laws 1998, ch. 147, § 1, in subsec. (1), substituted "podiatric physician and surgeon" for "podiatrist"; and, at the end of subsec. (3), added ", until the date the patient or the patient's representative has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or the patient's representative has one year from the date of the actual knowledge in which to commence a civil action for damages".

2006 Legislation
Laws 2006, ch. 8, § 302 reenacted the section without change.

Appendix C

HOUSE BILL REPORT
2SHB 2292

As Passed Legislature

Title: An act relating to improving health care by increasing patient safety, reducing medical errors, reforming medical malpractice insurance, and resolving medical malpractice claims fairly without imposing mandatory limits on damage awards or fees.

Brief Description: Addressing health care liability reform.

Sponsors: By House Committee on Judiciary (originally sponsored by Representatives Lantz, Cody, Campbell, Kirby, Flannigan, Williams, Linville, Springer, Clibborn, Wood, Fromhold, Morrell, Hunt, Moeller, Green, Kilmer, Conway, O'Brien, Sells, Kenney, Kessler, Chase, Upthegrove, Ormsby, Lovick, McCoy and Santos).

Brief History:

Committee Activity:

Judiciary: 1/13/06 [DP2S].

Floor Activity:

Passed House: 1/23/06, 54-43.
Senate Amended.
Passed Senate: 2/22/06, 48-0.
House Concurred.
Passed House: 2/28/06, 82-15.
Passed Legislature.

Brief Summary of Second Substitute Bill

- Makes a number of changes relating to health care practices and discipline, including protecting apologies and reports of unprofessional conduct, changing health care provider disciplining standards, and requiring disclosure of adverse events.
- Makes a number of changes to the medical malpractice insurance industry, including requiring closed claim reporting, changing requirements relating to underwriting standards and cancellation or non-renewal of policies, and requiring prior approval of rates and forms.
- Makes a number of changes to the health care liability system, including changes in the areas of the statute of limitations, certificates of merit, voluntary arbitration, collateral sources, and frivolous suits.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass. Signed by Representatives Lantz, Chair; Flannigan, Vice Chair; Williams, Vice Chair; Campbell, Kirby, Springer and Wood.

Minority Report: Without recommendation. Signed by Representatives Priest, Ranking Minority Member; Rodne, Assistant Ranking Minority Member and Serben.

Staff: Edie Adams (786-7180).

Background:

PATIENT SAFETY

Statements of Apology: Under both a statute and a court rule, evidence of furnishing or offering to pay medical expenses needed as the result of an injury is not admissible in a civil action to prove liability for the injury. In addition, a court rule provides that evidence of offers of compromise are not admissible to prove liability for a claim. Evidence of conduct or statements made in compromise negotiations are likewise not admissible.

In 2002, the Legislature passed legislation that makes expressions of sympathy relating to the pain, suffering, or death of an injured person inadmissible in a civil trial. A statement of fault, however, is not made inadmissible under this provision.

Reports of Unprofessional Conduct: A provision of law gives immunity specifically to physicians, dentists, and pharmacists who in good faith file charges or present evidence of incompetency or gross misconduct against another member of their profession before the Medical Quality Assurance Commission, the Dental Quality Assurance Commission, or the Board of Pharmacy.

Medical Quality Assurance Commission Membership (MQAC): The MQAC is responsible for the regulation of physicians and physician assistants. This constitutes approximately 23,000 credentialed health care professionals. The MQAC currently has 19 members consisting of 13 licensed physicians, two physician assistants, and four members of the public.

Health Care Provider Discipline: The Uniform Disciplinary Act (UDA) governs disciplinary actions for all 57 categories of credentialed health care providers. The UDA defines acts of unprofessional conduct, establishes sanctions for such acts, and provides general procedures for addressing complaints and taking disciplinary actions against a credentialed health care provider. Responsibilities in the disciplinary process are divided between the Secretary of Health (Secretary) and the 16 health profession boards and commissions according to the profession that the health care provider is a member of and the relevant step in the disciplinary process.

Disclosure of Adverse Events: A hospital is required to inform the Department of Health when certain events occur in its facility. These events include: unanticipated deaths or major

permanent losses of function; patient suicides; infant abductions or discharges to the wrong family; sexual assault or rape; transfusions with major blood incompatibilities; surgery performed on the wrong patient or site; major facility system malfunctions; or fires affecting patient care or treatment. Hospitals must report this information within two business days of the hospital leaders learning of the event.

Coordinated Quality Improvement Programs: Hospitals maintain quality improvement committees to improve the quality of health care services and prevent medical malpractice. Quality improvement proceedings review medical staff privileges and employee competency, collect information related to negative health care outcomes, and conduct safety improvement activities. Provider groups and medical facilities other than hospitals are encouraged to conduct similar activities.

INSURANCE INDUSTRY REFORM

Medical Malpractice Closed Claim Reporting: The Insurance Commissioner (Commissioner) is responsible for the licensing and regulation of insurance companies doing business in this state. This includes insurers offering coverage for medical malpractice. There is no statutory requirement for insurers to report to the Commissioner information about medical malpractice claims, judgments, or settlements.

Underwriting Standards: Underwriting standards are used by insurers to evaluate and classify risks, assign rates and rate plans, and determine eligibility for coverage or coverage limitations. Insurers, including medical malpractice insurers, are not required to file their underwriting standards with the Commissioner.

Cancellation or Non-Renewal of Liability Insurance Policies: With certain exceptions, state insurance law requires insurance policies to be renewable. An insurer is exempt from this requirement if the insurer provides the insured with a cancellation notice that is delivered or mailed to the insured no fewer than 45 days before the effective date of the cancellation. Shorter notice periods apply for cancellation based on nonpayment of premiums (10 days) and for cancellation of fire insurance policies under certain circumstances (five days). The written notice must state the actual reason for cancellation of the insurance policy.

Prior Approval of Medical Malpractice Insurance Rates: The forms and rates of medical malpractice polices are "use and file." After issuing any policy, an insurer must file the forms and rates with the Commissioner within 30 days. Rates and forms are subject to public disclosure when the filing becomes effective. Actuarial formulas, statistics, and assumptions submitted in support of the filing are not subject to public disclosure.

HEALTH CARE LIABILITY REFORM

Statutes of Limitations and Repose: A medical malpractice action must be brought within time limits specified in statute, called the statute of limitations. Generally, a medical malpractice action must be brought within three years of the act or omission or within one year of when the claimant discovered or reasonably should have discovered that the injury was caused by the act or omission, *whichever period is longer.*

The statute of limitations is tolled during minority. This means that the three-year period does not begin to run until the minor reaches the age of 18. An injured minor will therefore always have until at least the age of 21 to bring a medical malpractice action.

The statute also provides that a medical malpractice action may never be commenced more than eight years after the act or omission. This eight-year outside time limit for bringing an action is called a "statute of repose." In the 1998 Washington Supreme Court decision *DeYoung v. Providence Medical Center*, the eight-year statute of repose was held unconstitutional on equal protection grounds.

Certificate of Merit: A lawsuit is commenced either by filing a complaint or service of summons and a copy of the complaint on the defendant. The complaint is the plaintiff's statement of his or her claim against the defendant. The plaintiff is generally not required to plead detailed facts in the complaint; rather, the complaint may contain a short and plain statement that sets forth the basic nature of the claim and shows that the plaintiff is entitled to relief.

There is no requirement that a plaintiff instituting a civil action file an affidavit or other document stating that the action has merit. However, a court rule requires that the pleadings in a case be made in good faith (Civil Rule 11). An attorney or party signing the pleading certifies that he or she has objectively reasonable grounds for asserting the facts and law. The court may assess attorneys' fees and costs against a party if the court finds that the pleading was made in bad faith, or to harass or cause unnecessary delay or needless expense.

Voluntary Arbitration: Parties to a dispute may voluntarily agree in writing to enter into binding arbitration to resolve the dispute. A procedural framework for conducting the arbitration proceeding is provided in statute, including provisions relating to appointment of an arbitrator, attorney representation, witnesses, depositions, and awards. The arbitrator's decision is final and binding on the parties and there is no right of appeal. A court's review of an arbitration decision is limited to correction of an award or vacation of an award under limited circumstances.

Pre-Suit Notice and Mandatory Mediation: Generally, a plaintiff does not have to provide a defendant with prior notice of his or her intent to institute a civil suit. In suits against the state or a local government, however, a plaintiff must first file a claim with the governmental entity that provides notice of specified information relating to the claim. The plaintiff may not file suit until 60 days after the claim is filed with the governmental entity.

Medical malpractice claims are subject to mandatory mediation in accordance with court rules adopted by the Washington Supreme Court. The court rule provides deadlines for commencing mediation proceedings, the process for appointing a mediator, and the procedure for conducting mediation proceedings. The rule allows mandatory mediation to be waived upon petition of any party that mediation is not appropriate.

Collateral Sources: In the context of tort actions, "collateral sources" are sources of payments or benefits available to the injured person that are totally independent of the tortfeasor. Examples of collateral sources are health insurance coverage, disability insurance, or sick

leave. Under the common law "collateral source rule," a defendant is barred from introducing evidence that the plaintiff has received collateral source compensation for the injury.

The traditional collateral source rule has been modified in medical malpractice actions. In a medical malpractice action, any party may introduce evidence that the plaintiff has received compensation for the injury from collateral sources, except those purchased with the plaintiff's assets (e.g., insurance plan payments). The plaintiff may present evidence of an obligation to repay the collateral source compensation.

Frivolous Lawsuits: Under both statute and court rule, the court may sanction a party or attorney for bringing a frivolous suit or asserting a frivolous claim or defense. Under the statute, which applies to all civil actions, if the court finds that the action, or any claim or defense asserted in the action, was frivolous and advanced without reasonable cause, the court may require the non-prevailing party to pay the prevailing party reasonable expenses and attorneys' fees incurred in defending the claim or defense.

Summary of Second Substitute Bill:

The Legislature finds that addressing the issues of consumer access to health care and the increasing costs of medical malpractice insurance requires comprehensive solutions that encourage patient safety, increase oversight of medical malpractice insurance, and make the civil justice system more understandable, fair, and efficient.

PATIENT SAFETY

Statements of Apology: In a medical negligence action, a statement of fault, apology, or sympathy, or a statement of remedial actions that may be taken, is not admissible as evidence in a civil action if the statement was conveyed by a health care provider to the injured person or certain family members within 30 days of the act or omission, or the discovery of the act or omission, that is the basis for the claim.

Reports of Unprofessional Conduct: A health care professional who makes a good faith report, files charges, or presents evidence to a disciplining authority against another member of a health profession relating to unprofessional conduct or inability to practice safely due to a physical or mental condition is immune in a civil action for damages resulting from such good faith activities. A health care professional who prevails in a civil action on the good faith defense is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense.

Medical Quality Assurance Commission (MQAC): The public membership component of the MQAC is increased from four to six members, and at least two of the public members must not be representatives of the health care industry.

Health Care Provider Discipline: When imposing a sanction, a health profession disciplining authority may consider prior findings of unprofessional conduct, stipulations to informal disposition, and the actions of other Washington or out-of-state disciplining authorities.

Disclosure of Adverse Events: A medical facility must notify the Department of Health (DOH) within 48 hours of confirmation that an adverse event has occurred. The medical facility must submit a subsequent report of the adverse event to the DOH within 45 days. The report must include a root cause analysis of the adverse event and a corrective action plan, or an explanation of the reasons for not taking corrective action. Facilities and health care workers may report the occurrence of "incidents." "Adverse event" is defined as the list of serious reportable events adopted by the National Quality Forum in 2002. "Incident" is defined as an event involving clinical care that could have injured the patient or that resulted in an unanticipated injury that does not rise to the level of an adverse event.

The DOH must contract with an independent entity to develop a secure internet-based system for the reporting of adverse events and incidents. The independent entity is responsible for receiving and analyzing the notifications and reports and developing recommendations for changes in health care practices for the purpose of reducing the number and severity of adverse events. The independent entity must report to the Legislature and the Governor on an annual basis regarding the number of adverse events and incidents reported and the information derived from the reports.

Coordinated Quality Improvement Programs: The types of programs that may apply to the Department to become coordinated quality improvement programs are expanded to include consortiums of health care providers that consist of at least five health care providers.

Prescription Legibility: Prescriptions for legend drugs must either be hand-printed, typewritten, or generated electronically.

INSURANCE INDUSTRY REFORM

Medical Malpractice Closed Claim Reporting: Self-insurers and insuring entities that write medical malpractice insurance are required to report medical malpractice closed claims that are closed after January 1, 2008, to the Office of the Insurance Commissioner (Commissioner). Closed claims reports must be filed annually by March 1, and must include data for closed claims for the preceding year. The reports must contain specified data relating to: the type of health care provider, specialty, and facility involved; the reason for the claim and the severity of the injury; the dates when the event occurred, the claim was reported to the insurer, and the suit was filed; the injured person's age and sex; and information about the settlement, judgement, or other disposition of the claim, including an itemization of damages and litigation expenses.

If a claim is not covered by an insuring entity or self-insurer, the provider or facility must report the claim to the Commissioner after a final disposition of the claim. The Commissioner may impose a fine of up to $250 per day against an insuring entity that fails to make the required report. The Department may require a facility or provider to take corrective action to comply with the reporting requirements.

A claimant or the claimant's attorney in a medical malpractice action that results in a final judgement, settlement, or disposition, must report to the Commissioner certain data, including the date and location of the incident, the injured person's age and sex, and information about

the amount of judgement or settlement, court costs, attorneys' fees, or expert witness costs incurred in the action.

The Commissioner must use the data to prepare aggregate statistical summaries of closed claims and an annual report of closed claims and insurer financial reports. The annual report must include specified information, such as: trends in frequency and severity of claims; types of claims paid; a comparison of economic and non-economic damages; a distribution of allocated loss adjustment expenses; a loss ratio analysis for medical malpractice insurance; a profitability analysis for medical malpractice insurers; a comparison of loss ratios and profitability; and a summary of approved medical malpractice rate filings for the prior year, including analyzing the trend of losses compared to prior years.

Any information in a closed claim report that may result in the identification of a claimant, provider, health care facility, or self-insurer is exempt from public disclosure.

Underwriting Standards: During the underwriting process, an insurer may consider the following factors only in combination with other substantive underwriting factors: (1) that an inquiry was made about the nature or scope of coverage; (2) that a notification was made about a potential claim that did not result in the filing of a claim; or (3) that a claim was closed without payment. If an underwriting activity results in a higher premium or reduced coverage, the insurer must provide written notice to the insured describing the significant risk factors that led to the underwriting action.

Cancellation or Non-Renewal of Liability Insurance Policies: The mandatory notice period for cancellation or non-renewal of medical malpractice liability insurance policies is increased from 45 days to 90 days. An insurer must actually deliver or mail to the insured a written notice of the cancellation or non-renewal of the policy, which must include the actual reason for the cancellation or non-renewal and the significant risk factors that led to the action. For policies the insurer will not renew, the notice must state that the insurer will not renew the policy upon its expiration date.

Prior Approval of Medical Malpractice Insurance Rates: Medical malpractice rate filings and form filings are changed from the current "use and file" system to a prior approval system. An insurer must, prior to issuing a medical malpractice policy, file the policy rate and forms with the Commissioner. The Commissioner must review the filing, which cannot become effective until 30 days after its filing.

HEALTH CARE LIABILITY REFORM

Statutes of Limitations and Repose: Tolling of the statute of limitations during minority is eliminated.

The eight-year statute of repose is re-established. Legislative intent and findings regarding the justification for a statute of repose are provided in response to the Washington Supreme Court's decision overturning the statute of repose in *DeYoung v. Providence Medical Center.*

Certificate of Merit: In medical negligence actions involving a claim of a breach of the standard of care, the plaintiff must file a certificate of merit at the time of commencing the action, or no later than 45 days after filing the action if the action is filed 45 days prior to the running of the statute of limitations. The certificate of merit must be executed by a qualified expert and state that there is a reasonable probability that the defendant's conduct did not meet the required standard of care based on the information known at the time. The court for good cause may grant up to a 90-day extension for filing the certificate of merit.

Failure to file a certificate of merit that complies with these requirements results in dismissal of the case. If a case is dismissed for failure to comply with the certificate of merit requirements, the filing of the claim may not be used against the health care provider in liability insurance rate setting, personal credit history, or professional licensing or credentialing.

Voluntary Arbitration: A new voluntary arbitration system is established for disputes involving alleged professional negligence in the provision of health care. The voluntary arbitration system may be used only where all parties have agreed to submit the dispute to voluntary arbitration once the suit is filed, either through the initial complaint and answer, or after the commencement of the suit upon stipulation by all parties.

The maximum award an arbitrator can make is limited to $1 million for both economic and non-economic damages. In addition, the arbitrator may not make an award of damages based on the "ostensible agency" theory of vicarious liability.

The arbitrator is selected by agreement of the parties, and the parties may agree to more than one arbitrator. If the parties are unable to agree to an arbitrator, the court must select an arbitrator from names submitted by each side. A dispute submitted to the voluntary arbitration system must follow specified time periods that will result in the commencement of the arbitration no later than 10 months after the parties agreed to submit to voluntary arbitration.

The number of experts allowed for each side is generally limited to two experts on the issue of liability, two experts on the issue of damages, and one rebuttal expert. In addition, the parties are generally entitled to only limited discovery. Depositions of parties and expert witnesses are limited to four hours per deposition and the total number of additional depositions of other witnesses is limited to five per side, for no more than two hours per deposition.

There is no right to a trial de novo on an appeal of the arbitrator's decision. An appeal is limited to the bases for appeal provided under the current arbitration statute for vacation of an award under circumstances where there was corruption or misconduct, or for modification or correction of an award to correct evident mistakes.

Pre-Suit Notice and Mandatory Mediation: A medical malpractice action may not be commenced unless the plaintiff has provided the defendant with 90 days prior notice of the intention to file a suit. The 90-day notice requirement does not apply if the defendant's name is unknown at the time of filing the complaint.

The mandatory mediation statute is amended to require mandatory mediation of medical malpractice claims unless the claim is subject to either mandatory or voluntary arbitration. Implementation of the mediation requirement contemplates the adoption of a rule by the Supreme Court establishing a procedure for the parties to certify the manner of mediation used by the parties.

Collateral Sources: The collateral source payment statute is amended to remove the restriction on presenting evidence of collateral source payments that come from insurance purchased by the plaintiff. The plaintiff, however, may introduce evidence of amounts paid to secure the right to the collateral source payments (e.g., premiums), in addition to introducing evidence of an obligation to repay the collateral source compensation.

Frivolous Lawsuits: An attorney in a medical malpractice action, by signing and filing a claim, counterclaim, cross claim, or defense, certifies that the claim or defense is not frivolous. An attorney who signs a filing in violation of this section is subject to sanctions, including an order to pay reasonable expenses and reasonable attorneys' fees incurred by the other party.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: None.
Persons Testifying: None.

Persons Signed In To Testify But Not Testifying: None.

Appendix D

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In re:
LINDA CUNNINGHAM,
Patient.

NO.

AFFIDAVIT OF SERVICE

State of Washington)
County of King S/S)

The undersigned, being first duly sworn, on oath deposes and says:

That the undersigned is now and at all times mentioned herein was a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness therein.

That on **August 5, 2008**, at **6:42 PM**, at the address of **12709 54th Avenue NW,** Gig Harbor, Washington, affiant duly served **Notice of Intent to Sue** in the above entitled action upon **Diane Cecchettini, Covington Multicare Clinic and Urgent Care** by then and there personally delivering true and correct copies thereof into the hands of and leaving same with **Diane Cecchettini** (50ish, white, female, 5'6", slim build) Multicare President and Chief Executive Officer.

		Each	Total
Service	1	$15.00	$15.00
Mileage/Trips	1	$80.00	$80.00
Affidavit	1	$15.00	$15.00
trace	1	$45.00	$45.00
Miscellaneous		$0.00	$0.00
			$155.00

R. Newland King County #9402780
Subscribed and sworn to me this
11th day of August, 2008.

Peter A. Valente- Notary Public in and for the State of Washington, residing at Seattle.
Commission expires June 7, 2012

SEATTLE LEGAL MESSENGER SERVICES, LLC
711 6TH AVENUE NORTH #100
SEATTLE, WA 98109
(206) 443-0885

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In re:
LINDA CUNNINGHAM,
Patient.

NO.

AFFIDAVIT OF SERVICE

State of Washington)
County of King S/S)

The undersigned, being first duly sworn, on oath deposes and says:

That the undersigned is now and at all times mentioned herein was a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness therein.

That on **August 4, 2008**, at **4:46 PM**, at the address of **533 South 336th Street, Suite C,** Federal Way, Washington, affiant duly served **Notice of Intent to Sue** in the above entitled action upon **Ronald F. Nicol, M.D., Valley Radiologists** by then and there personally delivering true and correct copies thereof into the hands of and leaving same with **Sherry Salvador** (45-50, white, female, 5'2", medium build) Administrative Assistant.

		Each	Total
Service	1	$15.00	$15.00
Mileage/Trips	1	$55.00	$55.00
Affidavit	1	$15.00	$15.00
Miscellaneous		$0.00	$0.00
Miscellaneous		$0.00	$0.00
			$85.00

J. DeWitt King County #9402780
Subscribed and sworn to me this
11th day of August, 2008.

Peter A. Valente- Notary Public in and for the
State of Washington, residing at Seattle.
Commission expires June 7, 2012

SEATTLE LEGAL MESSENGER SERVICES, LLC
711 6TH AVENUE NORTH #100
SEATTLE, WA 98109
(206) 443-0885

Appendix E

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LINDA CUNNINGHAM AND DOWNEY C. CUNNINGHAM, A MARITAL COMMUNITY, Plaintiffs, vs. RONALD F. NICOL, M.D.; VALLEY RADIOLOGISTS, INC., P.S. and MULTICARE HEALTH SYSTEM, INC. dba COVINGTON MULTICARE CLINIC, Defendants.	No.

COMPLAINT FOR PERSONAL INJURIES IN TORT (MEDICAL NEGLIGENCE)

COME NOW the Plaintiffs, and for claims against these Defendants, allege as follows:

1. PARTIES:

1.1 Plaintiffs CUNNINGHAM: Linda Cunningham and Downey Cunningham, are husband and wife and at all material times were residents of

THE PEARSON LAW FIRM, P.S.
35131 SE DOUGLAS STREET, SUITE 103
SNOQUALMIE, WA 98065
425 831-3100
FAX 425 831-3105

King County, Washington; and Linda Cunningham was a patient receiving health care services through the named defendants.

1.2 Defendant NICOL: Ronald F. Nicol, M.D. is a health care professional duly licensed to practice as a specialist physician/radiologist in the State of Washington, and at all material times defendant Nicol was practicing in King County and a resident of the State of Washington; and on information and belief defendant Nicol was an employee or agent of the other defendants, through which Nicol provided radiology services to plaintiff/patient Linda Cunningham, acting within the scope of his employment.

1.3 Defendant Multicare: Multicare Health Systems, Inc, dba Covington Multicare Clinic, is a corporation which provides medical services to the public, acting through its agents and employees, including defendant Valley Radiologists and defendant Nicol.

1.4 Defendant Valley: Valley Radiologists, Inc., P.S., is a corporation which provides medical services to the public, acting through its agents and employees, including defendant Nicol.

2. JURISDICTION AND VENUE: The subject matter hereof and the parties hereto are subject to the jurisdiction of the above-entitled Court; and venue is proper.

3. NEGLIGENCE, LIABILITY FACTS AND LIABILITY THEORIES

3.1 On or about August 24, 2000, plaintiff Linda Cunningham was seen by her primary care physician Pamela Yung MD, and referred for imaging studies through the Covington Multicare Clinic to rule out any serious

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and life threatening causes of Linda Cunningham's reported symptoms. Plaintiff Linda Cunningham requested, and was legally entitled to receive, reasonably prudent health care services.

3.2 The imaging studies at issue (brain MRI) were taken on August 24, 2000 and reported by and through the defendants as normal; and in fact, the imaging studies were markedly abnormal, and showed abnormalities of extra-axial tumor mass, evident on all pulse sequences and more than eight images; and Linda Cunningham did not learn of any issues pertaining to the old films managed by these defendants until February 2008.

3.3 The health care services defendants provided to plaintiff Linda Cunningham were below the standard of care, as defendants negligently failed to accurately review and accurately report the abnormalities on the subject imaging studies, and failed to alert the plaintiffs to the inaccurate reporting.

3.4 At all material times defendant Nicol acted independently and/or as apparent or actual agent or employee of Covington Multicare, and/or Valley Radiologists.

3.5 Standard of Care: The health care provided by the defendants was below the standard of care, and the defendants failed in their duty to provide reasonable and prudent care, and failed to exercise the degree of skill, care, and learning expected of reasonably prudent providers under such circumstances.

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4. CAUSATION AND DAMAGES: As a direct, immediate and proximate result of the defendants' negligent and wrongful conduct Plaintiffs sustained severe personal injuries, and permanent disabilities, including loss of consortium, all to their actual and continuing damage in an amount to be proven at trial.

5. **DECLARATORY RELIEF IS REQUESTED DUE TO THE PRESENCE OF A JUSTICIABLE CONTROVERSY: CONTRADICTIONS BETWEEN STATUTORY PREREQUISITES TO SUIT AND THE APPLICABLE STATUTE OF REPOSE:** RCWA 7.70.100 requires a mandatory Notice of Intent To Sue; the statute dictates that no claim can be commenced until a Notice is provided and a 90 day waiting period has passed; the statute also confirms that upon compliance with this requirement all applicable statutes of limitation will be extended for 90 days. RCWA 7.70.100, however, does not address the implications of the 90 day notice on the applicable statute of repose under RCWA 4.16.350 which provides that regardless of any late discovery of negligence, no claim can be commenced after eight years.

Under the legislative history of the applicable statute our Legislature specifically declared its intentions in its effort to address judicial concerns:

> "The purpose of this section and section 302, chapter 8, Laws of 2006 is to respond to the court's decision in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136 (1998), by expressly stating the legislature's rationale for the eight-year statute of repose in RCW 4.16.350.

Plaintiffs note the potential contradictions between these principles of limitation, repose and extension, and the judicially recognized difference

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between statutes of limitation and statutes of repose; and plaintiffs note that the Notice of Intent To Sue required by RCWA 7.70.100, if valid, effectively shortens the applicable statute of repose to less than eight years, unlawfully denying certain citizens like Linda and Downey Cunningham access to the courts and denying essential rights guaranteed by the Constitution of the State of Washington.

Plaintiffs also note that if our courts treat the statute of repose as a statute of limitation, and the Notice and 90 day waiting period extends this applicable limitation period, then compliance with RCWA 7.70.100 will extend the period of repose beyond eight years.

Plaintiffs seek Declaratory Relief to resolve all ambiguity under these facts, and provide judicial confirmation that the case has been properly commenced.

WHEREFORE, Plaintiffs pray for Declaratory Relief and judgment against Defendants jointly and severally as follows:

a. For an amount commensurate Plaintiffs' injuries to be determined at the time of trial;

b. For Plaintiffs' costs, disbursements, pre-judgment interest on liquidated damages and attorney's fees incurred herein;

c. For declaratory relief as referenced above; and

d. For such other and further relief as the court deems just and equitable.

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DATED this 20th day of August, 2008.

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